NO. 98-1167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

EDWARD CHRISTENSEN, et al.
Petitioners,

v.

HARRIS COUNTY, TEXAS, et al.
Respondents

On Petition For A Writ Of Certiorari
to the
United States Court Of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL P. FLEMING
County Attorney
Harris County, Texas

BRUCE S. POWERS
Assistant County Attorney
Counsel of Record for Respondents
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (281) 755-8359
Fax: (281) 755-8924

A Law Brief Co. • 6605 McGrew • Houston, Texas 77087 • (713) 981-9000

1688

QUESTION PRESENTED

Does an employer violate the provisions of the Fair Labor Standards Act by shortening an employee's workweek and paying off an equivalent amount of the employee's accrued compensatory time?

PARTIES TO THE PROCEEDING

Petitioners:

Edward A. Christensen; Kenneth O. Adams; David W. Addison; Jose A. Alvarado; Robert Amboree; Bobby G. Andrews; Randy Anderwald; Gary R. Ashford; Craig L. Bailey; Richard Bailey; Richardo E. Balderaz; Herbert V. Barnard; Gerald Barnett; Paulette M. Barnett; Brad T. Bennett; Bridgett Blackmon; Flynt E. Blackwell; Gary F. Blahuta; Scott P. Blankenburg; Deborah Bliese; Bruce H. Breckenridge; J. W. Brooks; Brian Buchanan; Patricia M. Bui; Don E. Bynum; Clarence A. Callis; William M. Campbell; Heather Carr; Thomas J. Carr; Paul E. Carpenter; Robert Casey; Mark E. Cepiel; Eladio C. Chavez; Roy Clark; Denny D. Coker; Alford A. Cook; Gregory P. Cox; Donald D. Crayton; Richard D. Crook; David A. Davis; Gary W. Davis; Christopher E. Dempsey; Russell Dukes; Larry A. Eikhoff; Frank Fairley; David W. Finely; James P. Fitzgerald; Erine R. Fowler; Michael A. Garcia; Thomas M. Gentry; John Godejohann; Robert M. Goerlitz; David Gonzales; Raul V. Gonzales; Miguel A. Gonzalez; Billy Gray; William L. Gray; Lawrence P. Gries; Thomas P. Gurney; Preston R. Halfin; Sammy Head; Neil Hines; Larry D. Howell; Marshall P. Isom; James A. Johnson; Derry L. Jones; David E. Kaup; William C. Kenisell; Howard J. Kimble; Steve Kirk; Edgar D. Knighten; Freddy G. Lafuente; Michael G. LaGrone; Al Lanford; Vernon S. Lemons; Shemei B. Levi; Jeanne Long; Timothy Loyd; Joe S. Magallon; David B. Martin; Pedro Martinez; Russell L. Mayfield; Terry McGregor; Robert C. Meaux; Stephen Melinder; Marty M. Mingo; D. D. Montgomery; Jose L. Morin; Richard O. Newby; Arthur W. Nolley; William R. Norwood; Richard C. Nunnery; Karen D. O'Bannion; Raymond E. O'Bannion; Guadalupe Palafox; Wayne Parinello; Deborah Petruska; James A. Phillips;

Simon C. Ramirez; Michael B. Rankin; James C. Reynolds; Willard G. Rogers; Gerald M. Robinson; Joe Ruffino; Lance J. Scott; Rob R. Self; Donald Shaver; James K. Shipley; James Smedick; Gina K. Spriggs, (Grahmann); Jeffery M. Stauber; Larry L. Strickland; Billy J. Taylor; Kerry Townsend; Richard S. Trenski; Gordon Trott; Ed Trotti; Richard D. Valdez; Dalton E. Van Slyke; Frank L. Vernagallo; Ruben Villarreal; Johnny F. Walling; Gerald R. Warren; James M. Watson; Thomas G. Welch; John H. Wheeler; Joseph L. Williams; Rwanda Wiltz

Respondents:

Harris County, Texas, Tommy B. Thomas, Harris County Sheriff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

REGULATIONS

SECONDARY MATERIAL

STATEMENT OF THE CASE

The parties stipulated that the following is a true and accurate description of the policy of the Harris County Sheriff's Department regarding compulsory use of accumulated compensatory time:

> Harris County personnel regulations provide for the payment of compensatory time off for its employees in accordance with the Fair Labor Standards Act. It is the policy of the Harris County Sheriff's Department that the compensatory time of employees, who for purposes of the Fair Labor Standards Act are considered non-exempt, will be maintained below a predetermined maximum level. Pursuant to this policy, each Bureau Commander determines the maximum number of compensatory hours that may be maintained by the employees in his or her bureau. Such determination is based upon an assessment of the personnel requirements of the particular bureau. Whenever it appears that an employee has accumulated compensatory hours which approach the maximum allowable number of compensatory hours authorized by the Fair Labor Standards Act, the employee is advised that he or she is nearing the maximum number and is requested to voluntarily take steps to begin reducing the number of accumulated compensatory hours. If the employee does not voluntarily take steps to reduce the accumulated hours within a reasonable time, the employee's supervisor is authorized to order the employee to reduce his or her accumulated compensatory time. While the Department attempts to arrange mutually agreeable times for the employee to utilize his or her accumulated compensatory time, an agreement cannot always be reached between the employee and the supervisor. In

> that event, the supervisory personnel are authorized by the Department to issue an order directing the employee to utilize compensatory time at a time or times that will best serve the personnel requirements of the bureau. If the employee is dissatisfied with the supervisor's order, he or she may complain to higher levels of supervision within the Department on an informal basis.

Doc. 24.

Respondents challenge and dispute the following assertion in the Petition to the extent that it might be construed as a statement of fact rather than an unproven allegation:

> ". . . [t]he County failed and refused to grant the Deputies the use of their accumulated compensatory time when they reasonably requested [it]...". (Petition p. 4-5).

This claim was abandoned by Petitioners in the court below. *Moreau v. Harris County*, 158 F.3d 241, 244 (5th Cir. 1998). Further, there is no summary judgment evidence in the record supporting this allegation. Therefore, it has no bearing on the issue before this Court and should not be considered for any purpose.

REASONS FOR DENYING THE WRIT

Although the decision of the Eighth Circuit in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert. denied sub nom. Schriro v. Heaton*, 515 U.S. 1104 (1995) and the decision of the Fifth Circuit in the instant case are in conflict, resolution of the conflict is irrelevant to the ultimate outcome of this case. In that regard, no error in the judgment of the court below has been shown. Therefore, the petition should be denied.

The statutory provisions in issue in this case were a part of the Fair Labor Standards Amendments of 1985 which were enacted by Congress in response to this Court's decision in *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, this Court determined that the provisions of the Fair Labor Standards Act were applicable to state and local governments. The 1985 Amendments were intended to ease the fiscal transition for state and local governments newly subject to the Act. *Adams v. City of McMinnville*, 890 F.2d 836, 837 (6th Cir. 1989). To that end, the amendments allow public agencies to provide compensatory time in lieu of cash overtime pay if an employee agrees to such an arrangement. In this case, the Petitioners are parties to the requisite agreements. *Moreau v. Klevenhagen*, 508 U.S. 22 (1993). In an effort to balance the employee's right to make use of earned comp time and the employer's need for flexibility in operations, Congress provided that an employee of a public agency shall be permitted to use such time within a reasonable period after making a request if the use of compensatory time does not unduly disrupt the operations of the public agency. 29 U.S.C. § 207(o)(5) (1994 ed.). *See Senate Report No. 99-159, 99th Cong., 1st Sess. (1985)*. It is apparent from the wording of the statute, particularly the nondiscrimination provision, that Congress intended to ensure that the employees of a public agency receive the benefit of the new law by preventing public employers from undermining its provisions. Pub. L. 99-150 § 8, 99 Stat. 791 (29 U.S.C. § 215 note). However, there is no expressed intent that the employee should be able to "bank" his comp time as suggested by the Eighth Circuit in *Heaton v. Moore*. On the contrary, the statute reflects a very different intent by providing that "if compensation is *paid* to an employee *for accrued compensatory time off*, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment". 29 U.S.C. § 207(o)(3)(B) (1994 ed.) (emphasis added). Likewise, applicable federal regulations provide that "payments for accrued compensatory time earned after April 14, 1986, may be made

at any time and shall be paid at the regular rate earned by the employee at the time the employee receives such payment". 29 C.F.R. § 553.27(a) (1998) (emphasis added). Thus, both the statute and the regulation clearly contemplate a circumstance in which a public employer elects to reduce or eliminate the accrued compensatory time of an employee by making a cash payment. As long as the employee is paid for his accumulated compensatory time at his current regular rate of pay, the statute is satisfied. The Eighth Circuit's view to the contrary is simply erroneous.

The Eighth Circuit came to its erroneous conclusion based upon the maxim of statutory construction *inclusio unius est exclusio alterius*. As the court noted, "[u]nder that principle of construction, 'when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.' " *Heaton*, 43 F.3d at 1180. The court then concluded that "Congress has limited the public employer's control over an employee's use of compensatory time only to situations where an employee's requested use of compensatory time would be 'unduly disruptive' to the public employer's operations". However, the rule that the court relied upon is a "rule of statutory construction and not a rule of law. Thus, it can be overcome by a strong indication of contrary legislative intent or policy". *Sutherland Stat. Const.* § 47.23 (5th ed. 1992). Obviously, in *Heaton* the Eighth Circuit totally ignored the provisions of the statute permitting cash payment for accrued compensatory time. 29 U.S.C. § 207(o)(3)(B). As Justice Thomas stated in *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992), "in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. ... When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete' ". If the literal wording of 29 U.S.C. § 207(o)(3)(B) permits cash payments for accrued compensatory time, no rule of statutory construction can provide otherwise.

The payment provision in subsection (3)(B) must necessarily apply only to pre-termination reductions of accrued compensatory time because subsection (4) covers payment at termination of employment. Who then has the option to reduce accrued compensatory time prior to termination of employment? Pre-termination reductions must be at the *employer's* option because the basic purpose of the 1985 Amendments was to ease the burden on public employers resulting from the *Garcia* decision. If it were the employee's option to demand payments for accrued comp time under subsection (3)(B), the employer's option to substitute compensatory time for cash payments for overtime worked would become meaningless. The employee could always ask for the cash whenever he or she wanted it. Thus, the words used by Congress in 29 U.S.C. § 207(o)(3)(B) nullify the analysis employed by the Eighth Circuit in *Heaton*. Further, the inclusion of subsection 3(B) in the statute makes manifest the importance of correct issue identification in the instant case. Petitioners frame the issue as follows:

> The question presented here is whether under 1985 compensatory time amendments to the FLSA, 29 U.S.C. § 207(o), its implementing regulations, 29 C.F.R. §§ 553.20-553.28, and the Secretary of Labor's considered interpretations and rulings thereon, a local governmental entity which utilizes a system of accrued compensatory time in lieu of cash for overtime hours may, absent an agreement with the employer permitting such compulsion, compel employees to utilize or burn their accumulated compensatory time involuntarily, that is, when they do not request it?

Respondents submit that the issue is more accurately stated as follows:

> Does an employer violate the provisions of the Fair Labor Standards Act by shortening an employee's workweek and paying off an equivalent amount of the

employee's accrued compensatory time?

This formulation of the issue is more appropriate because it focuses upon the practical effect of the policy in question. When the Petitioners are asked to utilize a portion of their compensatory time, they are not required to report for work and they receive compensation at their current regular rate of pay for the amount of comp time utilized. Thus, their hours of work are reduced and they receive cash compensation for overtime hours previously worked. Neither of these "effects" of the policy is prohibited by the Fair Labor Standards Act.

Similarly, in *Adams v. City of McMinnville*, 890 F.2d 836 (6th Cir. 1989), the public employer had unilaterally changed the work schedule of its firefighters. The effect of the change was to reduce the total number of hours each firefighter worked so that overtime pay would not be required. The firefighters alleged that this constituted discrimination prohibited by the Fair Labor Standards Act. The Sixth Circuit noted that the city did not attempt to alleviate the fiscal predicament threatened by the *Garcia* decision by reducing the firefighters' effective hourly pay rate, while requiring them to work the same number of hours. The court concluded that "[w]hen a public employer responds to fiscal pressures created by the FLSA by reducing employees' hours in order that they not work overtime, thereby eliminating the city's need to pay premium wages for overtime, the employer does not violate Section 8" of the Fair Labor Standards Amendments of 1985. The court stated that legislative history explicitly distinguishes between a public employer who responds to the application of the FLSA to its employees by reducing their regular hourly pay rate and an employer who simply reduces the overtime hours its employees will work. Quoting from the legislative history, the court said the following:

The Conference Committee noted that

> [a] unilateral reduction of regular pay or fringe benefits that is intended to nullify this legislative application of overtime compensation to State and local government employees is unlawful. Any other conclusion would in effect invite public employers to reduce regular rates of pay shortly after the date of enactment so as to negate the premium compensation mandated by this legislation.

Joint Explanatory Statement of the Committee of Conference, H.R.Conf.Rep. No. 357, 99th Cong., 1st Sess. 9, *reprinted in* 1985 U.S. Code Cong. & Admin. News 651, 670. In contrast, the Conference Committee also stated that "[a]n employer's adjustment of work schedules to reduce overtime hours would not constitute discrimination under this provision so long as it was not undertaken to retaliate for an assertion of coverage." *Id.* at 8, 1985 U.S. Code Cong. & Admin. News 670.

890 F.2d at 840.

Respondents submit that the Sixth Circuit, like the Fifth Circuit in the instant case, correctly analyzed the 1985 amendments. As noted by this Court in *Crandon v. U.S.*, 494 U.S. 152 (1990), in determining the meaning of a statute, the courts must look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. When one analyzes the

1985 Amendments in that light, it is clear that the comp time policy in issue in this case does not contravene the provisions of the Fair Labor Standards Act. It was not the object of the Amendments to create a new form of "savings account" for public employees. It was to accommodate the needs of the States and their political subdivisions while ensuring (1) that public employees receive premium rate compensation for overtime worked and (2) that "payment" not be delayed unreasonably.

Petitioners contend that "[i]n failing to give controlling deference to the regulations and interpretation of the Secretary of Labor" in this case, the Fifth Circuit erred in its application of the Fair Labor Standards Act. They base this on the statement in the majority opinion that "Congress has not spoken clearly in the text of the statute itself or in the legislative history". Petition, p. 24-25. First, it should be noted that this argument is a significant departure from the Petitioners' argument in the court below. There they asserted that the county's policy concerning compulsory use of compensatory time "contravenes the **plain language** of the 1985 Amendments to the Act". (emphasis added) Appellees' Brief, p. 13. Now, however, Petitioners apparently embrace the argument that the statute is silent or ambiguous with respect to the specific issue before the Court. As reiterated by this Court in *Auer v. Robbins*, 519 U.S. 452 (1997), arguments which are inadequately preserved in prior proceedings are not considered in this Court. Thus, Petitioners have waived the argument which forms the central theme of their Petition. In the event that the Court nevertheless elects to consider the Petitioners' argument, Respondents submit that the argument is flawed. In that regard, it is simply inaccurate to contend that Congress has not spoken to the question at issue. As this Court stated in *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-843 (1984), "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

expressed intent of Congress".

Respondents submit that the intent of Congress expressed in the 1985 Amendments is clear with respect to the issue in this case. Again, as noted above, correct issue identification is of the utmost importance. Certainly, 29 U.S.C. § 207(o) contains no provision *expressly* stating that an employer may or may not compel employees to utilize compensatory time involuntarily. However, the statute does make clear that an employer may pay off accrued compensatory time at the employee's current hourly rate prior to the termination of employment. 29 U.S.C. § 207(o)(3)(B). The statute contains no restriction on the amount of compensatory time which may be paid off by the employer. Thus, the employer is free to pay off the entire compensatory time balance or as little as a single hour at any time. Further, the Fair Labor Standards Act addresses only a minimum wage rate and *maximum* hours of work. It does not guarantee a minimum number of hours of work per week. Consequently, the employer may shorten the employee's workweek without violating the Act. If the employer may do these things separately without violating the Act, it may do them in combination as well by ordering the employee to use a portion of his or her accrued comp time. Thus, the intent of Congress is clearly expressed in the statute and the Secretary of Labor's interpretation is not the "reference point which *controls* judicial application of the statute" as the Petitioners now contend. However, it should be noted that the applicable federal regulation is in no way contrary to the Respondents' position in this case. See 29 C.F.R. § 553.27(a) (payments for accrued compensatory time may be made *at any time* and shall be paid at the regular rate earned by the employee at the time the employee receives such payment).

As stated in the Fifth Circuit's opinion, "the economic incentives at stake are clear". *Moreau v. Harris County*, 158 F.3d 241, 245 (5th Cir. 1998). Tight budgets require that public

employers such as Harris County seek to limit the accrual of compensatory time in order to avoid paying cash overtime wages when the accrued amount of time reaches the statutory maximum. The Petitioners on the other hand wish to accumulate comp time up to the statutory maximum in order to receive cash payments for overtime work. Further, if the accrued comp time can be "banked" until termination of employment it provides a large severance payment to the employees and a correspondingly large budgetary problem for the County. Congress enacted the 1985 Amendments to assist local governments to avoid such budgetary problems. Therefore, Respondents submit that having a policy which seeks to limit the accrual of compensatory time is in no way contrary to congressional purpose and is in fact more in line with such purpose than is the position of the Petitioners in this case.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL P. FLEMING
COUNTY ATTORNEY
HARRIS COUNTY, TEXAS

BRUCE S. POWERS
ASSISTANT COUNTY ATTORNEY
1019 Congress, 15th Floor
Houston, Texas 77002
(713) 755-8359
(713) 755-8924—FAX

Counsel of Record for Respondents